

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
May 25, 2006 Session

BILLY R. INMON v. BRETT HADLEY, ET AL.

**Appeal from the Circuit Court for Jefferson County
No. 19,964-IV & 19,965-I Ben W. Hooper, II, Judge**

No. E2005-00834-COA-R3-CV - FILED AUGUST 31, 2006

Brett Hadley and Tammy Hadley (“the Lessees”) entered into a lease-to-purchase agreement with an owner of property, Billy R. Inmon (“the Lessor”). The agreement pertains to the Mountain Harbor Inn located in Dandridge. It was for a period of 15 years. After operating the Inn for approximately three years, the Lessees defaulted. The Lessor filed a detainer warrant against the Lessees seeking past due rent and possession of the property. The Jefferson County General Sessions Court granted the Lessor possession of the property and a judgment for \$26,399.60. The Lessees appealed to the Jefferson County Circuit Court and posted an appeal bond in the amount of \$51,000.00. The appeal was dismissed because the bond was deemed insufficient. After the case was remanded to the general sessions court, the Lessees posted a cash bond in the amount of \$20,250.00 after filing a petition for writ of certiorari and supersedeas to the circuit court. The \$20,250.00 was loaned to the Lessees by David Cooper. The circuit court refused to issue the writ. After the Lessor filed a second lawsuit and was awarded an additional judgment of \$31,187.25 for past due rent, the circuit court ordered disbursement of the \$71,250.00, bond and cash being held by the court, with the Lessor receiving \$57,586.85 of the total amount on deposit. David Cooper was allowed to intervene in the lawsuit and Cooper and the Lessees sought to have the \$20,250.00 loaned by Cooper returned to him. The circuit court refused. The Lessees and Cooper appeal. We affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the
Circuit Court Affirmed; Case Remanded**

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

Bruce Hill, Sevierville, Tennessee, for the appellants, David Cooper and Laura Cooper.

Rebecca D. Slone, Dandridge, Tennessee, for the appellants, Brett Hadley and Tammy Hadley.

G. Wendell Thomas, Jr., and Rob Quillin, Knoxville, Tennessee, for the appellee, Billy R. Inmon.

OPINION

I.

This somewhat confusing history of litigation has its genesis in a written "Lease Agreement" executed by the Lessor and the Lessees on January 1, 2002. The agreement was actually a lease-to-purchase agreement and it pertained to the Mountain Harbor Inn located in Dandridge. The total sale price was \$400,000, which was to be amortized over the 15-year term of the lease based upon the Lessees' monthly installment payments of \$4,237.45 each. In addition to these payments, the agreement also required Lessees to make the following monthly payments:

Lessee¹ will pay an additional payment of \$20,000 for this Lease, which will be paid by adding \$500 to the monthly installments [until paid off as shown in] Schedule B.... Each year the total cost of taxes and insurance will be projected for the year and divided by (12) twelve and added to the \$4,737.45 monthly installments....

Lessee agrees to pay all taxes and insurance for the real estate and building as they become due. Lessee agrees to pay (100%) one-hundred percent of business insurance including liability insurance of (\$1,000,000) one-million dollars. Lessor will obtain policy and Lessee will pay Lessor for the cost thereof. Lessee agrees to pay the taxes and insurance as an additional payment to be added to monthly installments.

This litigation began roughly 3½ years later when the Lessor filed a detainer warrant against the Lessees in the Jefferson County General Sessions Court. The Lessor sought possession of the property and past due rent. Although the record does not contain a copy of the detainer warrant, we have been provided with an order entered by the general sessions court on July 27, 2004. This order provides as follows:

[T]he Court finds based upon the testimony of witnesses, the arguments of counsel and the record as a whole that: 1) the [Lessees] are in breach of their lease with [the Lessor] by their failure to pay rent; 2) the [Lessor] is entitled to be restored to possession of the real property...; 3) the [Lessor] is entitled to recover all equipment, inventory, furniture and fixtures located [on the property] ... ; and 4) the [Lessor] is entitled to a judgment against [the Lessees], jointly and severally, in the amount of \$26,399.60.

¹ The Lessees were referred to in the singular in the lease.

On August 5, 2004, the Lessees appealed the general sessions court's judgment to the Jefferson County Circuit Court. Along with the notice of appeal, the Lessees filed a cash bond in the amount of \$51,000,² which they claimed represented "one year's rent." The Lessees also filed, for the first time, a counterclaim against the Lessor. According to the counterclaim, the Lessees, in November, 2001, were the successful bidders when the subject property was sold at foreclosure by the federal Small Business Administration ("the SBA"). Their bid was for \$353,850. The counterclaim states that the Lessees paid ten percent down on the date of the sale and agreed to pay the balance within 20 days, and that the Lessees were attempting to obtain financing when they became associated with the Lessor. The Lessees claimed in their pleading that the Lessor, instead of assisting the Lessees with financing, purchased the property out from under the Lessees and then required the Lessees to enter into an "onerous" lease in order to protect the Lessees' original down payment of \$35,385.³ The Lessees claimed that the Lessor violated the Consumer Protection Act, Tenn. Code Ann. § 47-18-101, *et seq.*, and that they violated Tenn. Code Ann. § 47-50-109 when they interfered with the Lessees' contract with the SBA.

A hearing was conducted in the circuit court on August 20, 2004. At the hearing, the Lessor argued that the appeal should be dismissed because the amount of the appeal bond posted by the Lessees was legally insufficient. The Lessor argued that Tenn. Code Ann. § 29-18-130⁴ requires an appealing party to post a bond equal to one year of rental payments. The Lessor maintained that with the additional monthly payment of \$500 required by the lease and the monthly payments for taxes and insurance, the actual amount of the Lessees' required monthly payment was \$6,237.45. The bond posted by the Lessees, however, only covered the base monthly rental of \$4,237.47. The circuit

² The cash appeal bond was actually in the amount of \$50,049.40, but since the general sessions court, the circuit court, and the parties refer to the bond as if it had been for \$51,000, we will use that amount.

³ The lease agreement indicated that the Lessees would make a down payment of \$35,385, which would be credited against the first several months of installment payments and other costs. We assume this provision was intended to provide a mechanism by which the Lessees were to recoup their original down payment at the SBA sale.

⁴ Tenn. Code Ann. § 29-18-130(b)(2)(2000) provides as follows:

In cases where the action has been brought by a landlord to recover possession of leased premises from a tenant on the grounds that the tenant has breached the contract by failing to pay the rent, and a judgment has been entered against the tenant, the provisions of subdivision (b)(1) shall not apply. In that case, if the defendant prays an appeal, the defendant shall execute bond, or post either a cash deposit or irrevocable letter of credit from a regulated financial institution, or provide two (2) good personal sureties with good and sufficient security in the amount of one (1) year's rent of the premises, conditioned to pay all costs and damages accruing from the failure of the appeal, including rent and interest on the judgment as provided for herein, and to abide by and perform whatever judgment may be rendered by the appellate court in the final hearing of the cause. The plaintiff shall not be required to post a bond to obtain possession in the event the defendant appeals without complying with this section. The plaintiff shall be entitled to interest on the judgment which shall accrue from the date of the judgment in the event the defendant's appeal shall fail.

court agreed with the Lessor, and entered an order on the day of the hearing dismissing the appeal after finding the bond was “insufficient and does not meet the requirements of T.C.A. § 29-18-130 so that this court does not have jurisdiction to hear the appeal by the [Lessees].” The circuit court then remanded the case back to the general sessions court and, that same day, the general sessions court issued a writ of possession restoring the Lessor to possession of the property. No appeal was taken from the circuit court judgment and, with the passage of time, that judgment became final.

Three days after the case was remanded back to the general sessions court, the Lessor, on August 23, 2004, filed a motion to disburse the cash appeal bond and have the judgment paid from that bond. Two days later, the Lessees filed a petition for writ of certiorari and supersedeas pursuant to Tenn. Code Ann. § 29-18-129 (2000),⁵ seeking to have the case removed to the circuit court. The day after the petition was filed, a \$20,250 cash bond was deposited with the general sessions court on behalf of the Lessees. The receipt for the cash bond contains the following:

Received of David A. Cooper & Brett Hadley
Twenty Thousand Two Fifty and 00/100
Billy Inmon
vs.
Brett & Tammy Hadley

A hearing was held in circuit court on the Lessees’ petition for writ of certiorari and supersedeas. Following that hearing, the circuit court entered an order on September 15, 2004, denying the petition.

On October 11, 2004, the Lessor filed a second lawsuit against the Lessees in the general sessions court. In this second lawsuit, the Lessor sought damages resulting from the Lessees’ failure to pay rent that had accrued after August 1, 2004. A hearing was held in the general sessions court on: (1) the new lawsuit for post-August 1, 2004 unpaid rent; and (2) the Lessor’s motion in the first lawsuit seeking disbursement of the funds being held by the general sessions court. Following the hearing, the general sessions court entered a judgment for the Lessor in the amount of \$7,580.01 for unpaid rent accruing after August 1, 2004. When combined with the previous judgment for \$26,399.60, plus court costs, the general sessions court determined that the total amount owing to the Lessor was \$34,637.54. Of this amount, the general sessions court ordered that \$9,637.54 be disbursed to the Lessor once the judgment became final. As to the remaining \$25,000 owed the

⁵ Tenn. Code Ann. § 29-18-129 (2000) provides:

The proceedings in such actions may, within thirty (30) days after the rendition of judgment, be removed to the circuit court by writs of certiorari and supersedeas, which it shall be the duty of the judge to grant, upon petition, if merits are sufficiently set forth, and to require from the applicant a bond, with security sufficient to cover all costs and damages; and, if the defendant below be the applicant, then the bond and security shall be of sufficient amount to cover, besides costs and damages, the value of the rent of the premises during the litigation.

Lessor, the general sessions court ordered that amount to remain on deposit with the court pending further orders in case No. 25813-36-2.⁶ The remaining \$36,612.46 was to be divided equally between the individuals who posted the bonds for the Lessees. Thus, David Cooper was to receive \$18,306.23.

The Lessor apparently believed the most recent general sessions court order to be in error. Since that order addressed matters in two different lawsuits, the Lessor filed two notices of appeal to the circuit court. A “consolidated” trial was conducted on December 15, 2004, after which the circuit court made the following findings:

The [Lessees’] monthly rent obligation to the [Lessor] is \$6,237.45.

The [Lessor] has a valid, final judgment against the [Lessees] in the amount of \$26,399.60 that was entered on July 26, 2004 by the Jefferson County General Sessions Court

The [Lessees] have not paid rent for the months of August, September, October, November & December 2004 as required under the Lease between the parties.

The [Lessor] has undertaken reasonable efforts to mitigate his damages and has been unable to do so.

The [Lessor] is entitled to a judgment against the [Lessees] for the total amount of rent owing for the months of August, September, October, November & December 2004 in the amount of \$31,187.25.

The [Lessor’s] judgments against the [Lessees] are secured by the cash bond held by the Clerk of this Court in the amount of \$71,250.00.

The [Lessor] is entitled to immediate payment of its judgments in the total amount of \$57,586.85 out of such bond....

Of [Lessee’s] portion of the [remaining] bond money following payment of court costs, one-half is to be paid to D.A. Cooper....

David Cooper then filed a motion for permissive joinder with the circuit court. Cooper alleged that he had posted a cash bond as surety for the Lessees, but that the circuit court had dismissed the appeal because the bond was insufficient. Cooper added:

⁶ Case No. 25813-36-2 is yet a third lawsuit filed in the general sessions court. The record contains little information about this lawsuit other than it was filed by the Lessees against the Lessor.

Notwithstanding that dismissal of the appeal, the court held the entire bond until the 17th of December, 2004, and did not release it in its entirety back to D.A. Cooper as required by law. Rather, the court applied the bond to damages and rents owed to the Plaintiff, even though the bond posted was solely for the purposes of appeal.

D.A. Cooper should be allowed to join this litigation because he has a significant and valuable property right that has been adversely impacted by the court's ruling on December 17, 2004, and this litigation appears to be the only available avenue to seek relief for him....

Both the Lessees and Cooper then filed motions to alter or amend the judgment. The Lessees and Cooper argued that the cash bond could only be used to secure past due rent that accrued before possession of the property was returned to the Lessor. Since possession was returned to the Lessor by way of the writ of possession issued by the general sessions court on August 20, 2004, the bond, according to the Lessees and Cooper, could not be used for rent due after that date. In March, 2005, the circuit court entered an order stating that Cooper's motion for permissive joinder would be treated as a motion to intervene and would be granted. The circuit court then stated that "the [m]otions to [a]lter or [a]mend the [j]udgment by [Cooper] and [the Lessees] are denied."

II.

The Lessees and Cooper appeal. The Lessees claim the "lower courts err[ed] in commingling the detainer appeal bond and the certiorari-and-supersedeas bond." The Lessees also claim the circuit court erred in holding the Lessees liable for rent after possession of the premises was surrendered to Lessor who then began operating the business himself. Alternatively, the Lessees claim that even if they could be held liable for rent after possession was surrendered, the circuit court nevertheless erred in using the \$20,250 bond to satisfy that obligation. Cooper also appeals, claiming the circuit court erred in forfeiting the cash Cooper paid into court. Cooper argues that he never signed a bond or contract obligating himself to pay the Lessor for any judgment or past due rent. Cooper also claims the circuit court never actually set a bond in the supersedeas action that would have bound Cooper to the Lessor, and, therefore, these funds should be returned to Cooper.

III.

In this non-jury case, our standard of review is *de novo* upon the record of the proceedings below; however, the record comes to us with a presumption of correctness as to the trial court's factual determinations, a presumption that we must honor unless the evidence preponderates otherwise. Tenn. R. App. P. 13(d); **Wright v. City of Knoxville**, 898 S.W.2d 177, 181 (Tenn. 1995). Our review of questions of law is *de novo* with no such presumption of correctness attaching to the trial court's conclusions of law. **Campbell v. Florida Steel Corp.**, 919 S.W.2d 26, 35 (Tenn. 1996).

In applying our standard of review, we are mindful of the well-established principle that the trial court is in the best position to assess the credibility of the witnesses; accordingly, such determinations are entitled to great weight on appeal. *Massengale v. Massengale*, 915 S.W.2d 818, 819 (Tenn. Ct. App. 1995); *Bowman v. Bowman*, 836 S.W.2d 563, 567 (Tenn. Ct. App. 1991).

IV.

A.

The first issue we address is whether the circuit court erred when it concluded the Lessor was entitled to rent from August through December, 2004, in the amount of \$31,187.25. In reaching this conclusion, the circuit court specifically determined that the Lessor had “undertaken reasonable efforts to mitigate his damages” and was entitled to this five months of rent even though the Lessees had surrendered possession of the property in July. The Lessees argue that the detainer statute, Tenn. Code Ann. § 29-18-125 (2000), only authorizes an award of damages for unpaid rent up until the time the landlord regains possession. This statute provides that:

In all cases of forcible entry and detainer, forcible detainer, and unlawful detainer, the judge of the court of general sessions trying the cause shall be authorized and it shall be the judge’s duty to ascertain the arrearage of rent, interest, and damages, if any, and render judgment therefor if the judge’s judgment shall be that the plaintiff recover the possession.

In *Nashland Assocs. v. Shumate*, 730 S.W.2d 332 (Tenn. Ct. App. 1987), this Court rejected the very same argument. We stated:

The burden is upon the landlord to mitigate his damages. He must do what is fair and reasonable to reduce his damages. *See Gilson v. Gillia*, 45 Tenn. App. 193, 215, 321 S.W.2d 855, 865 (1958). Even though the tenant breaches the rental contract, the landlord is not entitled to a judgment for damages that could have been avoided by reasonable effort. *See Karns v. Vester Motor Co.*, 161 Tenn. 331, 334, 30 S.W.2d 245, 246 (1930).

In a breach of contract action, the plaintiff is entitled only to the damages that actually compensate him for the breach. He is not entitled to speculative damages. *See Hampton v. Co-operative Town Co.*, 48 S.W. 679, 686-687 (Tenn. Chan. App. 1898).

To compel the landlord to seek future rent would put him in the position of attempting to recover speculative damages because the amount of the landlord’s damages are not known until he attempts to

re-let the premises. Therefore, the tenant's interpretation of Tenn. Code Ann. § 29-18-125 would effectively bar a landlord from collecting damages and rent that accrued after the landlord gains possession by a detainer action, regardless of the terms of the broken lease.

Tennessee Code Ann. § 29-18-125 does not preclude a suit for rent which accrues subsequent to a judgment for possession.

Nashland Assocs., 730 S.W.2d at 333-34 (emphasis added). *See also Bellevue Properties, LLC v. United Retail Inc.*, No. M1999-01480-COA-R3-CV, 1999 WL 1086221 (Tenn. Ct. App. M.S. December 3, 1999), *no appl. perm. appeal filed* (affirming judgment for the lessor for approximately 11 months of rent, which rent accrued after possession of the commercial property was surrendered by the lessee in a situation where the lessor established that it had made reasonable efforts to mitigate damages).

The Lessor testified as to the efforts he made to mitigate damages after the Lessees surrendered possession of the property. He stated that he consulted with Franklin Realty with respect to seeking a tenant to lease the premises. He further testified that he entered into “negotiations quite extensively” with Frank Consentino who expressed interest in leasing the property. The Lessor added that he even drafted a contract for Mr. Consentino to lease the premises, but, in the end, Mr. Consentino's partner would not “go along with it.” The Lessor expressed his intent to keep the Inn open until he could find a new tenant. According to the Lessor, “I tried ... to keep things going while I was trying to least it; ... you can't lease a place as well that is dead and not doing anything, as well as you can with something that is open.” Even though the Lessor kept the Inn open while searching for a new tenant, the Inn operated at a loss during that time.

We conclude that the law does not prohibit the Lessor from filing an action seeking rent which accrued after the Lessees surrendered possession of the commercial property. We further conclude that the facts do not preponderate against the circuit court's finding that the Lessor was making reasonable efforts – without success – to rent the premises during the five months following his regaining of possession of the property. We, likewise, conclude that the evidence does not preponderate against the circuit court's conclusion that the Lessor made reasonable attempts to mitigate damages. There is no error in the judgment of the circuit court awarding Lessor a judgment for rent which accrued from August through December, 2004.

The initial judgment entered by the general sessions court was for \$26,399.60, which the circuit court correctly noted was a “final judgment.” Since we have just affirmed the amount of the second judgment entered for the Lessors in the amount of \$31,187.25, we conclude that the circuit court correctly entered a total judgment against the Lessees in the amount of \$57,586.85.

B.

The next issues question the propriety of the circuit court's order disbursing the \$71,250 being held by the court. Cooper argues that all he did was post a cash bond on behalf of the Lessees for their petition for writ of certiorari and supersedeas, and when the circuit court refused to issue that writ, the money should have been refunded to him at that time. The Lessor argues that Cooper did not comply with Tenn. R. Civ. P. 65A and, therefore, cannot be deemed a surety. Rule 65A provides as follows:

RULE 65A. FORM OF SECURITY; PROCEEDINGS AGAINST SURETIES. Whenever these rules require or permit the giving of a bond or other security, security may be given in any other form the court deems sufficient to secure the other party. Whenever security is given in the form of a bond or other undertaking with one or more sureties, the address of each surety shall be shown on the bond or other undertaking. Each surety submits to the jurisdiction of the court. A surety's liability may be enforced on motion without the necessity of an independent action. The motion shall be served on the surety as provided in Rule 5 at least 20 days prior to the hearing thereon.

(Capitalization in original).

The Lessor contends that Cooper did not sign a bond or other document making himself a surety in this case and never provided his address to the court. In short, the Lessor argues that Cooper failed to do what is required by Rule 65A to qualify as a surety.

Cooper's intent with regard to the \$20,250 is clearly established by his testimony:

A. There was an understanding that this money ... would result in [the Lessees] going back in the [Mountain Harbor Inn]. And if that were to be the case, then the [Lessees] had agreed to pay back some of the bond money over a period of time from profits they made at the [Inn].

Q. Were you to receive interest for this money?

A. Yes, I was.... I believe it was 10 percent....

Q. Was there any other compensation you were to receive?

A. There was a bond premium, also 10 percent.

Lest there be any doubt as to whether Cooper failed to qualify as a surety, we note that at the March 7, 2005, hearing, counsel for Cooper stated that while Cooper should “more or less” be treated as a surety, he also stated that Cooper was “really not a surety.... [Cooper] intended to be a surety but nothing ever happened.”

We conclude that Cooper is not a surety in this case. Cooper simply loaned the money to the Lessees prior to their unsuccessful attempt to obtain a writ of certiorari and supersedeas. Therefore, we must treat the \$20,250.00 as money belonging to the Lessees, not Cooper.⁷

C.

Although the Lessees and Cooper have phrased the remaining issues in various ways, what is left to be resolved essentially boils down to this: Can the \$71,250 which has been deposited into court by the Lessees as required by law and in their failed attempts to appeal the judgments be used by the court to satisfy those judgments against the Lessees? The question raised by this issue is answered by reference to Tenn. R. Civ. P. 67.02 and 67.03. These Rules provide:

67.02. Court May Order Deposit or Seizure of Property.— When it is admitted by the pleading or examination of a party that the party has in his or her possession or control any money or other thing capable of delivery which is the subject of the litigation and which is being held by the party as trustee for another party, or which belongs or is due to another party, the court may order the same to be deposited in court or delivered to such other party, with or without security, subject to further orders of the court, and the court may require the sheriff or other proper officer to take the money or property and deposit it or deliver it in accordance with the orders of the court.

67.03. Money Paid Into Court. — Where money is paid into court to abide the result of any legal proceeding, the judge may order it deposited in a designated state or national bank or savings and loan institution, to the credit of the court in the action or proceeding in which the money was paid. The money so deposited, with interest if any, shall be disbursed only upon the check of the clerk of the court pursuant to order of the court and in favor of the person to whom the order directs the payment to be made. Upon making a deposit in court a party shall not be liable for further interest on the sum deposited.

⁷ Although the Lessor correctly argues that the \$20,250 was nothing more than a loan by Cooper to the Lessees, the Lessor does not challenge Cooper’s right to intervene in this litigation.

(Capitalization in original).

When the initial bond of \$51,000 was deposited with the court, the first judgment of \$26,399.60 was, at that time, money “due to another party.” Once the second judgment was entered, a portion of the additional \$20,250, *which belonged to the Lessees* and which they deposited into court, likewise became money “due to another party.”

The whole point of requiring a lessee to post a bond when appealing from a detainer action and/or an action for unpaid rent is to protect the lessor. The bond protects the lessor from losing additional rent while the matter is in litigation. The purpose behind requiring the posting of a bond does not disappear simply because the amount of the bond posted by the appealing party does not satisfy the statutory requirement of being equal to “one (1) year’s rent.” Stated another way, if the Lessees in the present case had posted a bond for the correct amount of \$74,849.40, which equals one full year of rent, there can be no dispute that those funds could have been used to pay the \$57,586.85 judgment. So why should the result be any different simply because the Lessees did not post a bond in the correct amount? There is absolutely no logical reason to hold that because the Lessees failed to post a bond in a sufficient amount, the bond cannot be used to satisfy the judgment. If we did this, we would be rewarding the Lessees for failing to post a sufficient bond and for failing to otherwise comply with Tenn. Code Ann. § 29-18-130(b)(2)(2000).

We conclude that once the funds at issue were deposited into court, those funds came under the control of the court. *See* Tenn. R. Civ. P. 67.02 and 67.03. Therefore, the circuit court was acting within its authority when it ordered the disbursement of the \$71,250.

D.

While this case was pending on appeal, the Lessor filed a motion to strike one of the issues presented by the Lessees in their brief. Because the issue sought to be stricken by the Lessor pertained to the original judgment entered by the circuit court, which judgment had long since become final, we granted the Lessor’s motion. We reserved for later disposition the Lessor’s request for attorney fees incurred on appeal with respect to his motion. Exercising our discretion, we now decline to award the requested fees.

V.

The judgment of the circuit court is affirmed. This cause is remanded to the circuit court for enforcement of the trial court’s judgment and for the collection of costs assessed below, all pursuant to applicable law. Costs on appeal are assessed one-half to the appellants, Brett Hadley and Tammy Hadley, and one-half to the appellants, David Cooper and Laura Cooper.

CHARLES D. SUSANO, JR., JUDGE